91-1140

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WAGNER SEED COMPANY, INC.,

Petitioner,

vs.

GEORGE BUSH, as President of THE UNITED STATES OF AMERICA, *et al.*,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, by deferring to EPA's interpretation of the law, the judgment below deprived Petitioner of its statutory right to a plenary action in United States District Court, in contravention of the principle of separation of powers and the due process clause of the Fifth Amendment.

Rule 29.1 List

Petitioner Wagner Seed Company, Inc., is a subsidiary of Wagner Brothers Feed Corporation, a New York corporation.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

WAGNER SEED COMPANY, INC.,

Petitioner,

vs.

GEORGE BUSH, as President of
THE UNITED STATES OF AMERICA, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the

United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on October 15, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 946 F.2d 918, and is reprinted in the accompanying appendix at A-1.

The opinion of the United States District Court for the District of Columbia is reported at 709 F.Supp. 249 and is also reprinted in the accompanying appendix at A-64.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 9606(b)(2)(B) (1988), Petitioner, Wagner Seed Company, Inc. ("Wagner Seed"), initiated this action seeking reimbursement of the funds expended to comply with an Environmental Protection Agency ("EPA") Order under § 106 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 et seq. (1988 & Supp. I 1989), to clean up hazardous wastes at the site of its warehouse. Respondents moved to dismiss. The District Court granted dismissal. (Appendix, infra, p. 64).

On petitioner's appeal, the Court of Appeals for the District of Columbia entered a judgment and an opinion on October 15, 1991, affirming the District

Court's dismissal of the complaint. (Appendix, infra, p. 1).

The jurisdiction of this Court to review the judgment of the Court of Appeals for the District of Columbia is invoked under 28 U.S.C. § 1254(1) (1988 & Supp. I 1989).

STATUTE INVOLVED

42 U.S.C. § 9606 (1988) provides, in relevant part:

> (a) Maintenance, jurisdiction, etc. In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to

protect public health and welfare and the environment.

(b) Fines; reimbursement. (1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 [26 USC §§ 9501 et seq.].

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an

action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) [42 USC § 9607(a)] and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 107(a) [42 USC § 9607(a)] may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accor-

> dance with subsections (a) and (d) of section 2412 of title 28 of the United States Code....

(emphasis added.)

STATEMENT OF THE CASE

In 1985, Wagner Seed operated an animal feed store and agricultural supply business, distributing animal feed and agricultural products to nurseries and municipalities. R 80, R 413.[1] Wagner Seed stored various agricultural products, including pesticides, fertilizer and birdseed, at its warehouse in Farmingdale, New York. On June 1, 1985, a bolt of lightning struck Wagner Seed's warehouse and caused a fire which

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[1] References to the Appendix to Petitioner's Appeal to the United States Court of Appeals from the United States District Court are referred to as "R____."

destroyed the warehouse and its contents. R 90.

Several witnesses saw the lightning bolt strike the warehouse and watched helplessly as the fire engulfed the building. R 409-412. The lightning and resultant fire spread various contaminants on and off the Wagner Seed property. R 90, R 424-428.

During the fire fighting efforts and immediately after, Wagner Seed engaged in efforts to limit the spread of any pesticides or other noxious materials. R 108-116, R 117-121, R 424-428. Thereafter, Wagner Seed undertook a cleanup operation under the direction of the New York State Department of Environmental Conservation, with oversight by the United States

Environmental Protection Agency. R 108-116.

Notwithstanding these efforts, EPA unilaterally issued a cleanup order[2] (Index No. II-CERCLA 60202) under § 106(a) of CERCLA, 42 U.S.C. § 9606(a) (1988) ("106 Order") on December 31, 1985. This Order directed Wagner Seed to perform additional investigatory and remedial activities at the Wagner Seed property and surrounding neighborhood. R 87-106. The 106 Order provided that if Wagner Seed failed to comply it would be subject to daily fines of $5,000 and treble damages if the government had to

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2 Section 106(a) does not require that the recipient of the order be a CERCLA "responsible party" or even a "potentially responsible party". 42 U.S.C. § 9606(a) (1988).

expend its own funds to clean up the site. R 104.

Wagner Seed sought injunctive and declaratory relief against EPA based on its complete and absolute Act of God defense to the 106 Order under Section 107(b) of CERCLA, 42 U.S.C. § 9607(b) (1988 & Supp. I 1989). Wagner Seed Co., Inc. v. Daggett, C.V. No. 86-0097 (E.D.N.Y. January 27, 1986). The court found no jurisdiction to review the 106 Order prior to EPA enforcement. Therefore, Wagner Seed's liability could not be adjudicated unless Wagner Seed disobeyed the 106 Order and was sued in an action to enforce the Order or in a cost-recovery action for funds EPA would have expended. Wagner Seed appealed this order to the Second Circuit, which affirmed the District Court's

declination of jurisdiction. Wagner Seed Co., Inc. v. Daggett, 800 F.2d 310 (2d Cir. 1986). Faced with the possibility of ruinous fines and treble damages, Wagner Seed proceeded to comply with the 106 Order.

While Wagner Seed was performing under the 106 Order, Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), codified at 42 U.S.C. §§ 9601 et seq. (1988 & Supp. I 1989) ("SARA"). SARA added § 106(b) which provides that within 60 days after completion of the required action, any party who "receives and complies" with a 106 Order may petition EPA for reimbursement of its response costs from the Hazardous

Substance Superfund, 26 U.S.C. § 9501 (1988).

The statute authorizes a petitioner whose request is denied by EPA to institute an action in United States district court. 42 U.S.C. § 9606(b)(2)(B) (1988). In district court, a party seeking reimbursement on the grounds that it is non-liable has the burden of proof "by a preponderance of the evidence." 42 U.S.C. § 9606(b)(2)(C) (1988).[3]

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[3] The absence in § 106(b)(2)(C) of any reference to the prior administrative determination is especially significant when compared with § 106(b)(2)(D), which provides that a person who is liable under § 107(a) can recover response costs "to the extent that it can demonstrate, on the administrative record, that the [agency's] decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law." 42 U.S.C. § 9606(b)(2)(D) (1988) (emphasis

After considerable time, expense, and the potential for additional EPA directives, EPA notified Wagner Seed on January 27, 1988, that it had fully complied with the 106 Order. R 107. Within the statutorily mandated sixty (60) days, Wagner Seed filed a petition pursuant to § 106(b) for reimbursement of the $2,296,145.50 it expended on the cleanup, plus interest and attorneys fees. R 80-86.

On June 9, 1988, EPA denied Wagner Seed's petition for reimbursement,

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added). In contrast to § 107(a), Congress mandated that under § 106 the courts "apply traditional rules of forseeability, causation, and certainty in determining the extent of any recovery of damages under this provision to actions under § 106." House Committee on Energy and Commerce, H.R. Rep. No. 253, 99th Cong., 1st Sess., p. 83 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2865.

declining to address any liability issues and ignoring the Act of God defense Wagner Seed had presented through affidavits of eyewitnesses and experts. R 72-76. Instead, EPA interpreted the statute to conclude that since Wagner Seed had received the 106 Order prior to the enactment of § 106(b), it was not entitled to reimbursement. In EPA's view, the statute did not authorize reimbursement for costs incurred in connection with 106 Orders received prior to October 17, 1986, the effective date of SARA.

As empowered by the statute, Wagner Seed commenced the instant action in District Court seeking de novo consideration of its request for reimbursement of the funds expended in complying with the 106 Order. 42 U.S.C. § 9606(b)(2)(B)

(1988). R 30-38. EPA moved to dismiss the complaint on the ground, inter alia, that the court was compelled to defer to EPA's interpretation of the statute to the effect that reimbursement was not available to parties who had received a 106 Order prior to October 17, 1986. Wagner Seed cross-moved for summary judgment arguing that the undisputed facts established that it had complied with the procedural and substantive requisites of the statute and was entitled to judgment on the merits as a matter of law. The District Court granted dismissal. R 26-28.

On appeal, the Court of Appeals affirmed the District Court's dismissal of Wagner Seed's complaint and held that the statute was ambiguous and therefore the court should defer to EPA's reasonable construction of the statutory

provision in accordance with the doctrine enunciated in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).[4]

REASONS FOR GRANTING THE WRIT

By Erroneously Deferring to the EPA's Interpretation of the Law, 42 U.S.C. § 9606(b), the D.C. Circuit Disregarded Petitioner's Statutory Right to a Plenary Judicial Hearing in Contravention of the Principle of the Separation of Powers and Petitioner's Right to Due Process. This Raises an Important and Unresolved Issue.

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[4] The same issue has been addressed by two other courts. Both the Court of Appeals of the Seventh Circuit and the District Court for the Northern District of Illinois reached the same conclusion in connection with EPA's denial of a request for reimbursement. Bethlehem Steel Corp. v. Bush, 918 F.2d 1323, 1325 (7th Cir. 1990); Gary Steel Co. v. Reagan, 711 F. Supp. 471, 473 (N.D. Ill. 1989).

Blind Application of Chevron Deference Violates Due Process and Threatens to Undermine the Separation of Powers

While the doctrine enunciated in Chevron has been followed in literally hundreds of cases, the instant case presents a situation of constitutional dimension which has not previously been resolved by this Court. As discussed below, there is confusion and conflict: (i) over the applicability of the Chevron doctrine where a plenary right of action is authorized by statute; and (ii) whether an agency's litigating posture should ever be entitled to judicial deference. The blind adherence to Chevron in cases where Congress has

expressly mandated original judicial proceedings where administrative action is challenged, violates due process and threatens the independence of the Judiciary as the branch of government entrusted with adjudicatory disputes between citizens and the Executive.[5]

The judgment below sets a precedent which is an unconstitutional abdication

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[5] A fundamental principle unambiguously enunciated in our Constitution is that the process of adjudication remain independent and impartial. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58-61, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). As this Court has noted, "The constitutional system of checks and balances is designed to guard against 'encroachment or aggrandizement' by Congress at the expense of the other branches of government. Buckley v. Valeo, 424 U.S. 1, 122, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976)." Northern Pipeline, 458 U.S. at 83.

of the authority of Article III courts in the guise of deference to administrative agencies. Misapplying the doctrine of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, (1984),[6] the Circuit Court erroneously held here that it was constrained to defer to EPA's interpretation of Section 106(b)(2) of CERCLA. Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 925 (D.C. Cir. 1991). In so doing, the D.C. Circuit

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[6] Pursuant to the principle enunciated in Chevron, when a court is presented with "an executive department's construction of a statutory scheme it is entrusted to administer", then the judiciary must defer to that construction if it is reasonable. 467 U.S. at 844-45 (1984).

misapprehended a critical statutory provision that obligated the court to examine this matter de novo. 42 U.S.C. § 9606(b)(2)(B) (1988).[7] This Court has yet to consider whether Due Process mandates that the federal district court adjudicate a complaint such as Wagner Seed's and not simply rubberstamp an agency's interested interpretation of the statute.

It is one thing for the federal courts, in considering challenges to agency rules and regulations, to defer to agency expertise. See, e.g., Chevron, supra. Accord United States v.

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[7] In addition, at least one circuit has noted that courts, in general, must "review statutory interpretation decisions de novo." United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990).

Akzo Coatings of America, Inc., Nos. 89-2092, 89-2137 (6th Cir. Dec. 5, 1991) (available January 8, 1991, on LEXIS, Genfed Library, USAPP file) (held district court properly declined to engage in de novo review of consent decree negotiated by EPA and involving scientific determinations within the province of EPA's technical expertise). It is quite another for the federal courts to abdicate their role as impartial judicial adjudicators when Congress has specifically ordained plenary adjudication by the courts. As this court noted in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58, 102 S.Ct. 2858, 2864, 73 L.Ed.2d 598 (1982),

> The Federal Judiciary was . . . designed by the Framers to stand independent of the Executive and Legislature -- to maintain the

> checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.

Id. at 58.

The action by the D.C. Circuit in the instant case threatens to actuate the concern expressed in Crowell v. Benson, 285 U.S. 22, 57, 525 S.Ct. 285, 76 L.Ed.2d 598 (1932). The exercise of Article III judicial power (U.S. Const. Art. III, § 1) is not satisfied by limited appellate review. To paraphrase this Court, acceptance of the deferential standard applied by the D.C. Circuit in the case at bar "would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of bureaucratic character alien to our system. . . ."

Northern Pipeline, 458 U.S. at 86, n.39 (quoting Crowell, 285 U.S. at 57).

In several recent cases, this Court has grappled with various aspects of the scope of deference to be accorded pursuant to the decision in Chevron. There is a lack of clarity regarding the role of the federal district court when a private right of action is authorized by Congress and what type of agency action should be accorded deference. In Adams Fruit Company, Inc. v. Barrett, 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990), this Court refused to defer to an agency's interpretation of a statute because "Congress . . . expressly established the Judiciary and not the [agency] as the adjudicator of private rights of action arising under the statute." Adams

Fruit, 110 S.Ct. at 1390. The Court reasoned that "[a] precondition to deference under Chevron is a congressional delegation of administrative authority and found no such delegation regarding the enforcement provision evident in the statute at issue." Id. at 1390-91. Rather, the Court found that "Congress established an enforcement scheme independent of the Executive and provided aggrieved [parties] with direct recourse to federal court where their rights under the statute are violated. Under such circumstances, it would be inappropriate to consult the executive interpretations of [the statute] to resolve ambiguities surrounding the scope of [the act's] judicially enforceable remedy." Id. at 1391.

This Court specifically noted that delegation to the agency of a role in administering some aspects of the statutory scheme does not empower the agency to "regulate the scope of the judicial power vested by the statute." Id.[8]

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[8] It should be noted that Congress has not delegated the administration of CERCLA exclusively to EPA. Unlike other regulatory schemes the administration of which are delegated to a single agency, Congress expressly divided the functions under CERCLA among the President and a variety of agencies. See, e.g., 42 U.S.C. § 9604(i) (1988) (Agency for Toxic Substances and Disease registry within the Public Health Service); 42 U.S.C. § 9608(a)(2) (1988) (Secretary of the Treasury); 42 U.S.C. § 9608(a)(3) (1988) (Secretary of Transportation); 42 U.S.C. § 9604(g) (1988) and § 9610(b) (1988) (Secretary of Labor); 42 U.S.C. § 9611(c)(6) (1988) (Occupational Safety and Health Administration and the National Institute for Occupational Safety and Health); 42 U.S.C. § 9660(a) (1988) (Secretary of Health and Human Services). The President in turn delegated many of his CERCLA functions to at least eight agencies. See Exec. Order No. 12,580, 52 Fed. Reg. 2923 §§ 2-11 (1987).

The D.C. Circuit here circumvented Adams Fruit and held that EPA is obliged to interpret the statute in the first instance in evaluating the petition.[9]

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[9] The fact that CERCLA § 106 requires a party seeking reimbursement to petition the agency prior to commencing an action in the district court does not render the private right of action any less independent of administrative decision making. In this regard, § 106 resembles the provision in Title VII of the Civil Rights Act of 1964 that allows a claimant to commence a civil action in federal court based on unlawful employment practices only after it has filed a claim with the Equal Employment Opportunity Commission and the Commission has declined to pursue the matter. See 42 U.S.C. § 2000e-5(f) (1988). It is well established that such an action provides claimants "with the right to de novo consideration of their Title VII claims." Chandler v. Roudebush, 425 U.S. 840, 844, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1975) (holding that federal employees, like private sector employees, are entitled to independent action in district court).

It cited as authority NLRB v. Food and Commercial Workers, 484 U.S. 112, 108 S.Ct. 413, 98 L.Ed.2d 429 (1987). However, Food Workers is inapposite because it involved the nonreviewability in court of the decision by the General Counsel of the National Labor Relations Board to dismiss an unfair labor practice complaint. The majority concluded that the National Labor Relations Act, 29 U.S.C. §§ 141 et seq. (1988), differentiated between prosecutorial and adjudicatory functions, therefore, the General Counsel's action

was prosecutorial and non-reviewable per the regulations. To the extent that the D.C. Circuit in the instant case read Food Workers to require the Judiciary to defer to an agency's interpretation of a statute in a subsequent plenary action, it was in error. If the D.C. Circuit's analysis is followed, the authority to initiate an action in federal district court as has been authorized by Congress here, would be illusory.

Under the teaching of this court in Bowen v. Georgetown University Hospital, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), the EPA's interpretation here was not entitled to deference under Chevron. As noted by Justice Kennedy:

> **We have never applied the principle of [Chevron] to agency litigating positions that are wholly unsupported by**

> **regulations, rulings, or administrative practice.** To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'

Id. at 488 U.S. at 212. (emphasis added).

The importance, at this time, for the Supreme Court to draw a bright line between the inapplicability of Chevron deference where an agency's position is taken for litigating purposes and the applicability of Chevron deference where an agency's reasonable interpretation of a statute it was entrusted to administer is supported by regulations and rulings, is exemplified in the recent case of Gregory v. Ashcroft, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). In separate

opinions, Justice White, with whom Justice Stevens joined, and Justice Blackmun, with whom Justice Marshall joined, directly disputed the applicability of Chevron to the EEOC's interpretation of Title VII. Justice White, citing Bowen v. Georgetown University Hospital, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), concluded that "[t]he EEOC's position is not embodied in any formal issuance from the agency, such as a regulation, guideline, policy statement, or administrative adjudication. Instead, it is merely the EEOC's litigating position in recent lawsuits. Accordingly, it is entitled to little if any deference." Gregory, 111 S.Ct. at 2414, n.3 (emphasis in original).

Justice Marshall did not dispute that under Bowen, Chevron would not apply were an agency's position taken for litigation purposes. However, Justice Marshall opined that EEOC had issued an administrative ruling construing Title VII which was consistent with EEOC's "subsequent litigation position" and thus, Bowen was distinguishable. Id. at 2418, n.4. The majority was silent on the applicability vel non of Chevron and Bowen. Consideration of the instant case would provide an opportunity to clarify the current uncertain state of these important legal principles.

With only a few exceptions, the cases in which this Court has applied Chevron do not involve a court's de novo

examination.[10] For example, most

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10 At least one circuit has noted that a de novo examination "provides a wider scope of review than the 'substantial evidence' standard found in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)." Sims v. United States Dep't of Agriculture, Food & Nutrition Service, 860 F.2d 858, 862 (8th Cir. 1988). "As a result, the district court must reach its own factual and legal conclusions based on the preponderance of the evidence, and should not limit its consideration to matters previously appraised in the administrative proceedings." Id. at 862-863 (citations omitted). Where an agency has issued guidelines or other informal statutory interpretations, these guidelines, although "helpful in interpreting the law and regulations, are not binding on the court in making its de novo review." Id. at 863. See also, Ottati & Goss, Inc., 900 F.2d 429, 434-36 (1st Cir. 1990) (held court could independently re-examine EPA's chosen remedy under CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988) and was not restricted to standard under Administrative Procedure Act, 5 U.S.C. § 706); Ibrahim v. United States Dep't of Agriculture, 834 F.2d 52, 53-54 (2d Cir. 1987) (held Food Stamp Act required district court to re-examine Food and Nutrition Service's decision de novo rather than determining whether decision was supported by substantial evidence).

recently, in EEOC v. Arabian American Oil Co., 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991), this Court held that EEOC's interpretation of Title VII as applying to discrimination against American citizens outside the United States was not entitled to deference. The Court found unpersuasive EEOC's argument that as one of two federal agencies with primary responsibility for enforcing Title VII, the court should defer to its "consistent" construction of Title VII. 111 S.Ct. at 1236. EEOC's construction of Title VII was in the form of guidelines, not rules or regulations.

Id. The Court held that the level of deference to be afforded EEOC's interpretation of Title VII depended only on EEOC's power to persuade. Id. In making its decision, the Court did not even discuss the applicability of Chevron.

The statutory scheme under Title VII is similar to the CERCLA scheme involved in the instant case. Both include a requirement of a petition to the agency in the first instance. However, the requirement of a prior administrative petition in CERCLA § 106, like the presentment requirement in Title VII, is, at most, a jurisdictional prerequisite, and has no other bearing on the scope or the merits of the subsequent judicial proceeding. See McDonnell Douglas Corp. v. Green, 411

U.S. 792, 798-99, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The right to a plenary action is not a review of EPA's initial determination to deny reimbursement. Section 106(b)(2) expressly authorizes an "action" in federal district court. 42 U.S.C. § 9606(b)(2)(B). The court's obligation to perform a de novo examination precludes the court from automatically deferring to an agency's statutory interpretation and renders the agency's position as one taken purely for litigating purposes. See Bowen, supra.

This Court has not articulated the ramifications on a party's due process rights wrought by deference to administrative positions where the statute calls for an original proceeding in federal district court. See, e.g.,

Thomas v. Union Carbide Agricultural Products Co., 493 U.S. 568, 593, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985). Cf. Reardon v. United States, 947 F.2d 1509, 1523-24, (1st Cir. 1991) (held CERCLA statutory scheme under which liens may be imposed on property violates Fifth Amendment due process clause). The failure of a federal district court to examine a matter de novo where expressly directed by Congress to do so constitutes a violation of the petitioner's due process rights in that the court will unfairly adopt the agency's litigation position thereby depriving the claimant of an impartial adjudicator. See North v. Russell, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976); Ward v. Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972);

Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

EPA's construction of § 106(b)(2), 42 U.S.C. § 9606(b)(2) (1988), is analogous to a prosecutor's interpretation of a criminal statute prior to bringing an indictment in which case a court clearly would not be obligated to defer to a prosecutor's view of the statute. See Crandon v. United States, 494 U.S. 152, 177, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) (Scalia, J. concurring). "Due process dictates separation of the prosecutorial function from the decision-making function." United States v. Hardage, 663 F. Supp. 1280, 1290 (W.D. Okl. 1987) citing Morrissey, 408 U.S. at 485-86. See generally, Redisch and Marshall,

Adjudicatory Independence and the Values of Procedural Due Process, 95 Yale L.J. 455, 503 (1986). "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." Bowen, 488 U.S. at 213.

Indeed, the federal district courts appear generally to have accorded no deference to EPA's interpretations of the liability provisions of CERCLA § 107, which must be made in deciding whether to sue to compel compliance or recover cleanup costs from responsible parties. See, e.g., United States v. Kayser-Roth Corp., 910 F.2d 24, 26-27 (1st Cir. 1990) (meaning of "owner or operator" in CERCLA § 107(a)); United States v. Fleet Factors Corp., 901 F.2d 1550, 1554-60 (11th Cir. 1990) (scope of

secured creditor exemption); United States v. Monsanto, 858 F.2d 160, 168-78 (4th Cir. 1988) (meaning of affirmative defense under § 107(b)(3) and waste generator's responsibility under § 107(a)(3)); United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 743-44 (8th Cir. 1986) (individual liability under § 107(a)(3)). See also United States v. Ottati & Goss, Inc., 900 F.2d 429, 434-36 (1st Cir. 1990) (scope of injunctive relief authorized under § 106(a)); Environmental Defense Fund, Inc. v. The City of Chicago, 948 F.2d 345 (7th Cir. 1991) (meaning of "hazardous waste" for purposes of applying § 6921(i) of the Solid Waste Disposal Act, 42 U.S.C. §§ 6901 et seq. (1988)).

The D.C. Circuit's failure to independently interpret § 106(b)(2)(B) has denied petitioner an opportunity to present its case to an independent adjudicator. By deferring to EPA's interpretation of the law, the courts below have allowed EPA's refusal of Wagner Seed's petition for reimbursement to become the final decision without affording it due process. See Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

CONCLUSION

The courts below improperly abdicated their role as the adjudicators of private rights of action by deferring to EPA's construction of § 106(b)(2) of CERCLA where Congress intended the court to exercise its authority as an

Article III court. This petition raises important issues about the separation of powers and due process. This Court should address the important questions raised concerning (i) the applicability of Chevron to administrative actions; and (ii) the applicability of Bowen where no rule or regulation has been promulgated. The decision below is a precedent which exemplifies the sacrifice of the role of the judiciary on the altar of administrative deference. Accordingly, this petition for certiorari should be granted.

Respectfully submitted,

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January 10, 1992

APPENDIX

Wagner Seed Company, Inc., Appellant
v
George Bush, as President of the United States of America, et al., Appellees

No. 89-5139

United States Court of Appeals, District of Columbia Circuit

Argued March 12, 1990.

Decided October 15, 1991

As Amended October 15, 1991

Appeal from the United States District Court for the District of Columbia (No. 88-01922).

Frank L. Amoroso, New York City, with whom Albert Shuldiner and Neal J. Cabral, Washington, D.C., were on the brief, for appellant.

Letitia J. Grishaw, Atty., Dept. of Justice, with whom Richard B. Stewart, Asst. Atty. Gen., J. Carol Williams and Angus E. Crane, Attys., Department of Justice, Washington, D.C., were on the brief, for appellees.

Before BUCKLEY, WILLIAMS and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge D.H. GINSBURG.

Dissenting opinion filed by Circuit Judge STEPHEN F. WILLIAMS.

D.H. GINSBURG, Circuit Judge:

After complying with a clean-up order issued by the Environmental Protection Agency under the so-called Superfund law, Wagner Seed Company sought reimbursement of its expenses from the agency. The EPA denied Wagner's claim, concluding that the reimbursement provision of the statute does not apply to Wagner because the

Congress passed it after Wagner had received the EPA clean-up order. Wagner then sued.

The district court dismissed the case, holding first that the EPA's is a permissible interpretation of the statute to which the court must defer under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and second that in any case the tenets of statutory construction favor the EPA's reading. Wagner Seed Co., Inc. v. Bush, 709 F.Supp. 249, 252 (D.D.C.1989). We conclude that the statute is ambiguous as to whether reimbursement is available to a party that received a clean-up order prior to enactment of the statute; we affirm, however, because like the Seventh

Circuit, see Bethlehem Steel Corp., v. Bush, 918 F.2d 1323 (7th Cir.1990), we believe that the EPA's interpretation of the relevant provision, resolving that issue against reimbursement, is reasonable.

I. FACTS

In December 1985, the EPA issued a clean-up order, under § 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9606(a) (1982), requiring Wagner immediately to remove hazardous substances that had been released when a fire caused by lightning destroyed its warehouse. Wagner sought to enjoin enforcement of the order, but its motion for a preliminary injunction

was denied by a district court, Wagner Seed Co. v. Daggett, C.V. No. 86-0097 (E.D.N.Y. Jan. 27, 1986); the Second Circuit affirmed, 800 F.2d 310 (1986), holding the CERCLA does not provide for pre-enforcement review, see id. at 314-15. Wagner then carried out the required clean-up.

By October 17, 1986, Wagner had substantially completed the clean-up. (The Government asserts, and Wagner does not dispute, that it had by then expended 98% of its ultimate clean-up costs). On that date, the Congress passed the Superfund Amendments and Reauthorization Act of 1986 (SARA) Pub.L. No. 99-499, 100 Stat. 1613, which amended CERCLA by adding, inter alia, the following provision:

> Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the [Superfund] for the reasonable costs of such action, plus interest.

§ 106(b)(2)(A), 42 U.S.C § 9606(b)(2)(A) (emphasis added).

In January 1988, the EPA certified that Wagner had complied with the clean-up order, and within 60 days Wagner petitioned for reimbursement under § 106(b)(2)(A), on the ground that the release of hazardous materials was caused by an act of God. See § 101(1), 42 U.S.C. § 9601(1). In June 1988, the agency rejected Wagner's claim in a letter holding that the reimbursement provision of SARA, § 106(b)(2), applies only to clean-up orders received after the Congress adopted that provision. See Letter from J. Winston Porter,

Assistant Administrator for Solid Waste and Emergency Response 3-4 (June 9, 1988). Wagner then instituted this suit, as authorized by § 106(b)(2)(B).

Wagner asserts that the EPA erred in interpreting the phrase "receives and complies" in § 106(b)(2). As Wagner reads the statute, it required only that an order have been received and complied with by the time reimbursement is sought. The crux of its dispute with the EPA, therefore, is whether the Congress intended the term "receives" to apply retrospectively or only prospectively from the date the statute was adopted.

II. STANDARD OF REVIEW

Because this dispute involves the meaning of a statutory term

interpreted by the government agency with authority to administer the statute, we first consider whether we are free to construe the term independently or owe deference to the agency's interpretation. Preliminarily, we note that although § 106 vests initial authority in the President and not in the EPA, the President has delegated his authority under § 106 (and under much of CERCLA) to the EPA, as authorized by 42 U.S.C § 9606. See Exec.Order No. 12,580, § 4(d)(1), reprinted in 42 U.S.C.A. following § 9615. That delegation is sufficient to render the EPA the administering agency for purposes of Chevron. See Eagle-Picher Indus. v. EPA, 759 F.2d 905, 909 n. 9, 920 (D.C.Cir. 1985) (deferring to the EPA because it "has been entrusted [by the President] with the administration of CERCLA").

Under Chevron, when the court is presented with an interpretation of the statute by the agency that administers it, and "the statute is silent or ambiguous with respect to the specific issue," then the court must defer to that interpretation if it is reasonable. See Mead Corp. v. Tilley, 490 U.S. 714, 722, 109 S.Ct. 2156, 2161-62, 104 L.Ed.2d 796 (1989); NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 123, 108 S.Ct. 413, 420-21, 98 L.Ed.2d 429 (1987); American Mining Congress v. EPA, 824 F.2d 1177, 1182 (D.C.Cir.1987). The controlling principle of Chevron is that when the statute, viewed in light of its legislative history and the traditional tools of statutory construction, is ambiguous, the administering agency is entitled to make "a reasonable policy

choice," 467 U.S. at 843 & n. 9, 845, 104 S.Ct. at 2781 n. 9, 2783. Before we address the issue of whether the statute is indeed ambiguous, we consider Wagner's several arguments against the application of Chevron deference.

First, Wagner contends that Chevron is inapplicable because the statute gives it a de novo right of action in district court, rather than remitting it to a proceeding merely for judicial review of agency action. In this vein, Wagner points out that the statute requires a party seeking reimbursement to prove "by a preponderance of the evidence" that it is not liable for the cost of complying with the EPA's clean-up order. 42 U.S.C. § 9606(b)(2)(C). Wagner argues that for a court to review de novo the EPA's factual findings on liability under that

standard, only to defer under Chevron to the EPA's interpretation of the law, would invert "the traditional standard for judicial review of administrative actions," in which the court affords to the agency greater deference on issues of fact than on issues of law. The implication is that the Congress should not be thought, absent explicit direction, to have intended such a radical departure from "tradition."

The issue for the court is not whether Wagner is liable under the standard of paragraph (b)(2)(C), but whether Wagner is "a person who receive[d] and complie[d]" with an order (as those terms are used in paragraph (b)(2)(A)), which status is a pre-requisite to seeking reimbursement. Wagner's contention that all issues are

to be determined de novo, and that the judicial action must proceed without regard to the EPA's administrative decision, is absurdly rigid, departing from common sense as well as from "tradition." For if Wagner were correct, then the court would not defer either to the EPA's determination whether a party has "complied" with the agency's clean-up order. It would be truly bizarre, however, for a court to determine de novo that issue, which may involve both technical and policy questions within the expertise of the agency. That a private party whose claim has been considered by an administrative agency has a right to a trial de novo on issues of fact simply does not mean that the court will deny deference to the agency on an issue of

statutory interpretation. See Chandler v. Roudebush, 425 U.S. 840, 843, 864, 96 S.Ct. 1949, 1961, 48 L.Ed.2d 416 (1976) (right to trial de novo without deference to EEOC's findings of fact); Griggs v. Duke Power Co., 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 158 (1971) ("The administrative interpretation of the Act by the enforcing agency [EEOC] is entitled to great deference.").

Second, Wagner draws an analogy between the present action and an action brought under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., in which the agency's decision to deny a claim is accorded no deference. The FTCA and § 106(b)(1) are indeed similar in one respect: the presentation requirement in the former, 28 U.S.C. § 2401(b), and

the petition requirement in the latter, oblige the plaintiff first to have given the defendant agency an opportunity to resolve the dispute without a lawsuit. The two regimes differ, however, in a way more material to the Chevron question: the many agencies covered by the FTCA are by that law merely authorized to process and pay tort claims; in contrast the EPA, acting under CERCLA, is charged with the administration of a complex regulatory scheme. The latter agency alone may therefore lay claim to the administrative policy discretion necessarily attendant to that task.

Third, Wagner argues that Chevron deference is not in order because the EPA issued its prospective-only interpretation of § 106(b)(2) in a decision letter, "without a hearing,

without the use of an administrative law judge, without briefing, and, indeed, without demonstrating any consideration or analysis of the issues raised by Wagner['s] claim." "Such a blind process," we are told, "makes the EPA's position merely 'interpretive,' and not entitled to the deference accorded 'legislative' rule-making."

At the outset, we wish to be clear that we do not accept Wagner's premises that the agency's decision process was defective and that it gave no consideration to the issued involved, a claim that is at best hyperbolic. It may well be that the greater the procedural trappings that attend an agency's interpretive moment, the less reason for judicial concern that the interpretation was off-handed or

opportunistic, susceptible to discard tomorrow when another permissible interpretation better suits the agency's needs of the day. Likewise, the opinion of a low-level bureaucrat, given in a non-adversarial or informal context, may or may not be deemed sufficiently relevant to the agency's administration of the law to warrant deference under Chevron; but that is not at all the case before us.

The EPA's interpretation of § 106(b)(2) was given after due consideration in order to resolve an important and recurring matter before it. The decision letter under review poses the question whether retroactive application to Wagner is authorized or appropriate, considers the legislative history of the statute, and upon

analysis describes its purpose as the creation of an incentive to comply with agency clean-up orders. Furthermore, the agency has applied this interpretation consistently. See Bethlehem Steel, 918 F.2d at 1325 (EPA had reached same conclusion one month prior to decision letter in this case); Gary Steel Supply Co. v. Reagan, 711 F.Supp. 471, 473 (N.D.Ill.1989) (considering another like decision issued three months after agency decision in this case; court deferred to agency interpretation).

In any event, it simply is not the law of this circuit that an interpretive regulation does not receive the Chevron deference accorded a legislative regulation. See Theodus v. McLaughlin, 852 F.2d 1380, 1383-84 (D.C. Cir.1988);

see also Midtec Paper Corp. v. United States, 857 F.2d 1487, 1496-97 (D.C. Cir.1988) (deference due to a permissible agency interpretation whether it arises out of rulemaking or adjudication).

Seeking post-Chevron authority for its position, Wagner relies principally upon Doe v. Reivitz, 830 F.2d 1441, 1445-47 (7th Cir.1987), amended, 842 F.2d 194 (7th Cir. 1988), which held that a lesser degree of deference is owed to an "agency interpretation" than to the "high-powered" legislative type of regulation to which the Court deferred in Chevron. The vitality of Reivitz is unclear, however -- except in the present context. For when the Seventh Circuit considered the very EPA interpretation now before us, it deferred pursuant to

Chevron, rejecting the argument that the courts should give less deference to an "interpretive ruling" than to a "legislative ruling," Bethlehem Steel, 918 F.2d at 1327 n. 3 (relying upon, among others, Midtec Paper Corp., 857 F.2d at 1496-97, and Theodus, 852 F.2d at 1382-84). Thus, whatever Reivitz means, the Seventh Circuit itself does not believe that it means that the EPA's interpretation of the statute in this case should receive less than the usual deference due under Chevron.

Fourth, Wagner suggests that we should not defer to the EPA's interpretation of § 106(b)(2) because the reimbursement action it sets up is intended to provide redress where the agency has "made a mistake," i.e., issued a clean-up order to a party that

is not liable. We take Wagner's point to be that the agency will be reluctant to admit having made a mistake--and what bureaucracy is not? The question, though, is whether the agency will therefore give too narrow a reading to the statute.

Wagner's point would have real force as applied to the agency's particularized decision respecting liability; indeed, that may well be why the Congress provided for de novo judicial review of that type of decision. We deal here, however, with a broader question of statutory interpretation. It is fortuitous that this question arises as a potential bar to recovery by Wagner and, apparently, a few other parties whose notice and compliance straddles enactment of SARA.

True, under one interpretation of § 106(b) the agency may avoid the necessity to decide whether, in the affected cases, it erred in issuing its original clean-up order. That is surely too slight a gain, however, for the court to consider the agency an interested party whose interpretation is therefore not to be accorded the deference ordinarily due to the agency with responsibility for administering the law.

Fifth, Wagner contends that because this dispute concerns a "pure question of statutory interpretation," no deference is due to the EPA. In this regard, it relies upon certain decisions of this court that were superseded by the Food Workers case, 484 U.S. at 123, 108 S.Ct at 420-21. The Court there confirmed that judicial deference is

owed to the agency under step two of Chevron even when the only ambiguity involves "a pure question of statutory interpretation." See id. at 133-34, 108 S.Ct. at 426 (Scalia, J. concurring); Theodus, 852 F.2d at 1382-83, 1386-87 (D.C.Cir.1988).

Sixth, Wagner argues that the question of retroactive application of vel non is inappropriate for administrative determination because its resolution "is devoid of political or technical considerations." Chevron admits of no such limitation, however. As a practical matter, resolution of an ambiguity in a statute, if it has consequences inevitably requires the agency to consider competing policy objectives; it is the reconciliation of such conflicts that is entitled to

judicial deference under Chevron, 467 U.S. at 865, 104 S.Ct. at 2793.

Here, the EPA views its task as efficiently to use the scarce resources available to it in order to provide an incentive for a potentially responsible party to undertake a response action--a view deserving of special deference because the agency played an important role in the legislature's development of SARA, see Bethlehem Steel, 918 F.2d at 1328. When measured against that purpose, either of the two interpretations being advanced involves an imperfect fit. Wagner's interpretation, which would entail compensating those who had completed such action at the time the statute was passed, in overinclusive; the EPA's interpretation, which would deny compensation to those who had

received an order but (unlike Wagner) had not made substantial clean-up efforts at the time of passage, is underinclusive. In these circumstances, the agency's decision as to which interpretation brings about the better allocation of resources is a policy judgment, and as such it it entitled to Chevron deference.

Additionally, after this case had been argued, the Supreme Court decided Adams Fruit Co. v. Barrett, 494 U.S. 638, 110 S.Ct. 1384, 1390-91; 108 L.Ed.2d 585 (1990), and we invited the parties to submit supplemental briefs on the relevance of that decision to this case. In Adams Fruit, employees sued their employer for injuries they allegedly suffered when the employer intentionally violated the motor vehicle

safety provisions of a federal worker protection statute. The employer, relying in part upon the Labor Department's interpretation of the statute, argued that the state workers' compensation law provided the exclusive remedy. In the course of rejecting that argument, the Supreme Court held that even if the federal statute was ambiguous on this point, the Labor Department's interpretation of the statute was not entitled to deference: the Congress had given the Department a role in administering the statute, requiring the Secretary to promulgate standards implementing the motor vehicle provisions, but it had not delegated to the Department the power to "regulate the scope of the judicial power vested

by the statute." Id. 494 U.S. at ____, 110 S.Ct. at 1391.

Under the reimbursement scheme of SARA, by contrast, interpretation of the "receives and complies" requirement of § 106(b)(2)(A) is the agency's responsibility in the first instance. In interpreting this language, therefore, the EPA was not overstepping its proper administrative role in order to "regulate the scope of the judicial power" in a private cause of action. See also Food Workers, 484 U.S. at 123, 108 S.Ct. at 420-21 (Chevron deference applied where agency's interpretation had effect of precluding judicial review). On the contrary, as we have just seen, it was making a decision about the best allocation of the scarce resources made available by the Congress

for the purpose of providing an incentive for clean-ups that might not otherwise be undertaken by a potentially responsible party. If the EPA had purported to determine the manner in which a person seeking reimbursement must "file an action," or which is "the appropriate United States district court" under § 106(b)(2)(B), the paragraph creating the cause of action, the rationale of Adams Fruit would seem to apply. See also United States v. Ottati & Goss, Inc., 900 F.2d 429, 434 (1st Cir. 1990) (court not legally bound by first sentence of § 106(a) to enter the remedial injunction that EPA non-arbitrarily thinks proper). Because the EPA is obliged, however, to rule upon this meaning of the terms of § 106(b)(2)(A) in response to a petition for reimbursement, and in doing so must

resolve the policy issue raised by the petition, it can hardly be rebuffed, when it later asserts its claim in court to deference under Chevron, for trying to "bootstrap" itself into an area in which it has no jurisdiction." Cf. Adams Fruit, 494 U.S. at ___, 110 S.Ct. at 1390-91.

III. APPLICATION

Having determined that Chevron applies, we ask first whether "the intent of Congress is clear." 467 U.S. at 842-43, 104 S.Ct. at 2781-82. If we can, by "employing traditional tools of statutory construction, ascertain[ ] that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Id. at 843, 104 S.Ct. at 2782.

Each party contends that the plain language of the statute unambiguously supports its position. By its terms, § 106(b)(2)(A) provides a remedy for "[a]ny person who receives and complies" with a clean-up order. The EPA reads this phrase to refer only to a person who receives an order after the statute was enacted. Wagner sees in it the Congress's intent to reimburse any entity that ever received or receives an order, so long as it petitions for reimbursement within 60 days of completing its compliance with that order. The issue thus joined is whether the statute, which lists two conditions ("receives and complies") that must be satisfied by a party prior to petitioning for reimbursement, applies to a party that had satisfied the first condition before the statute was adopted.

The obvious starting point for interpretation is the presumption against retroactivity: "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result," Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988). If the presumption against retroactivity is not rebutted by clear terms to the contrary--and none is to be found in § 106--then the statute applies only prospectively. See, e.g., United States Fidelity & Guaranty Co. v. United States, 209 U.S. 306, 314, 28 S.Ct. 537, 539, 52 L.Ed. 804 (1908) (a statute "ought not to receive [retroactive] construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or

unless the intention of the legislature cannot be otherwise satisfied").

Wagner asserts that it is not a matter of retroactivity to apply the statute to a claim that did not accrue until after the statute was adopted--viz. when Wagner completed its compliance with the clean-up order. If Wagner is correct, then the rule against retroactivity precludes the application of a new statute to a case that could have been brought before the statue was adopted, but is not relevant where some but not all elements of the claim predate the statute. See Reynolds v. United States, 292 U.S. 443, 448-49, 54 S.Ct. 800, 803, 78 L.Ed. 1353 (1934) ("A statute is not rendered retroactive merely because the facts or requisites

upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment."); Shwab v. Doyle, 258 U.S. 529, 534-35, 42 S.Ct. 391, 392, 66 L.Ed. 747 (1922) ("laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared") (emphasis added); Kaiser Aluminium & Chemical Corp. v. Bonjorno, 494 U.S. 827, 110 S.Ct. 1570, 1583, 108 L.Ed.2d 842 (1990) (Scalia, J. concurring) ("It is at least arguable that it does not constitute retroactive application to apply a provision dealing with the award of costs or fees in litigation to all litigation that has not yet terminated when the provision takes effect.").

The Government does not rebut Wagner's argument, and we find no direct authority to resolve the issue it has raised. Thus, we reject the EPA's claim to ownership of the plain language of the statute.

Wagner's claim to the plain language of the statute turns out to be just that § 106(b)(2)(B) is a remedial provision to be liberally construed, see, e.g., Bell v. Brown, 557 F.2d 849, 853 (D.C.Cir.1977). If the language of the statute were plain enough, of course, Wagner would not be invoking a canon of liberal construction; but under Chevron the language need not be pellucid without the aid of a special lens in order for Wagner to prevail. We need only be able, with the application of "traditional tools of statutory

construction," to discern a congressional "intent[ ] on the precise question at issue." The 'rule' of construction upon which Wagner relies, however, is little more than a 'thumb on the scale' in the uncertain category of cases to which it applies; unlike, for example, the rule of ejusdem generis, it cannot supply a precise meaning to an otherwise ambiguous text. Thus, the rule in question cannot supply the specific congressional intent that Chevron requires.

Nor is legislative history helpful in resolving the issue. The EPA cites a statement made by Rep. Eckart:

> [Section 106(b)(2)] is intended to provide incentives for parties to undertake the work required in the order, even [if] they have legal objections to performing the work. Thus, effective after the date of enactment of these amendments,

> a party who receives an order can begin the work of environmental cleanup while preserving its right to raise objections in a subsequent proceeding.

132 Cong.Rec. 29779 (1986). We agree with the district court, see 709 F.Supp. at 251 & n. 2, that this statement is too general to evince the specific intent to preclude recovery where the cleanup comes after the effective date of the statute. We note, on the other hand, that nothing in the legislative history indicates an affirmative intention to allow recovery where the order was issued before the effective date of the statute.

The traditional tools of statutory construction thus provide us no plain and unambiguous answer to the question whether the Congress intended § 106(b)(2) to apply to any person who had already

received a clean-up order when it was enacted; therefore under Chevron we must accept the agency's interpretation if it is merely permissible. The EPA's construction of the statute is clearly a reasonable one: it is consistent with the Congress's objective of providing an incentive for any potentially non-liable party to begin a clean-up, and it deals in a reasonable, albeit not a compassionate, way with anyone who was unfortunate enough to have received a clean-up order before the Congress made provision for reimbursement.

IV. CONCLUSION

Because the Congress left it unclear whether the remedy of § 106(b) is

available to a person in Wagner's position, we are constrained to defer to the EPA's reasonable interpretation of the statute to deny reimbursement. The judgment of the district court is therefore.

Affirmed.

STEPHEN F. WILLIAMS, Circuit Judge, dissenting:

Under § 106(b)(2) of CERCLA (the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended), 42 U.S.C. § 9606(b)(2), any "person who receives and complies" with an abatement order under § 106(a) may seek reimbursement from the President. If his petition is rejected, he may file suit against the President, and recover if he establishes in court that he was

not liable for response costs under CERCLA § 107(a), 42 U.S.C. § 9607(a). Here the Environmental Protection Agency, as delegee of the President's duties under § 106(b), see Exec.Order No. 12,580, § 4(d)(1), 52 Fed.Reg. 2923, 2926 (1987), denied Wagner Seed's petition. It read the quoted language as allowing relief only for persons who receive their abatement orders after the date of enactment, October 17, 1986, though the words of the statute impose no such condition. If we owed the EPA deference on this interpretive issue, I would agree with the majority's decision to reject Wagner's suit; the statute does not clearly resolve the question and the EPA's reading is not unreasonable. See Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). But Chevron

calls for deference only when a court reviews an agency's construction of a statute "which it administers", id. at 842, 104 S.Ct. at 2781 (emphasis added). While Congress put the President in charge of many aspects of CERCLA, it gave the administration of § 106(b)(2) to the courts, not to him or his delegee. EPA has occasion to interpret the "receives and complies" language of § 106(b)(2) only because of its authority (as the President's delegee) to pay the petitioner off and thus avert a suit. This involvement seems to me too peripheral to make Chevron applicable.

Adams Fruit Co. v. Barrett, 494 U.S. 638, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990), represents the opposite pole from Chevron. There the Court

unanimously refused to defer to the Department of Labor on the question of whether exclusivity provisions in state workers' compensation law "reverse pre-empted" a federal private right of action created by § 1854 of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-72. Despite the Secretary's power to administer the act generally, including her power to set safety standards, 29 U.S.C. § 1841(b)(2) (and the concomitant judicial deference to those judgments, see 494 U.S. at ___, 110 S.Ct. at 1391), and her general rulemaking authority under § 1861 (which she had exercised on the controlling issue), the Court refused to defer to the Secretary's views on the scope of § 1854: "Congress has expressly established the Judiciary

and not the Department of Labor as the adjudicator of private rights of action arising under the statute." Adams Fruit, 494 U.S. at ___, 110 S.Ct. at 1390. The agency could not "bootstrap" its § 1841 authority over standards into an area in which it had "no jurisdiction." Id. 494 U.S. at ___, 110 S.Ct. at 1391.

This case is not quite so strongly against deference as Adams Fruit. There Congress had not charged the Secretary of Agriculture with any administrative task that called on her to interpret § 1854, so her construction was quite gratuitous. Here, as a result of the President's delegation, the EPA had to construe § 106(b)(2) as a predicate to its own action. Cf. Maj. Op. at 923. But government agencies often construe a

statute as a prelude to litigation. Prosecutors must interpret criminal statutes in order to bring indictments and faithfully enforce the law, yet no court defers to their view of the statute. A more "specific responsibility for administering the law" is needed to trigger Chevron, Crandon v. United States, 494 U.S. 152, 110 S.Ct. 997, 1011, 108 L.Ed.2d 132 (1990) (Scalia, J. concurring in the judgment); see also United States v. Western Electric Co., 900 F.2d 283, 297 (D.C. Cir. 1990) (no deference to decisions reached in agency's "prosecutorial role").

Indeed, the courts appear generally to have accorded EPA no deference even in its interpretation of the liability provisions of CERCLA § 107,

interpretations that EPA must make in deciding whether to sue to compel compliance or recover cleanup costs from responsible parties. See, e.g., United States v. Kayser-Roth Corp., 910 F.2d 24, 26-27 (1st Cir.1990) (meaning of "owner or operator" in CERCLA § 107(a)); United States v. Fleet Factors Corp., 901 F.2d 1550, 1554-60 (11th Cir.1990) (same, including scope of secured creditor exemption); United States v. Monsanto Co., 858 F.2d 160, 168-70 (4th Cir.1988) (meaning of affirmative defense under § 107(b)(3) and waste generator's responsibility under § 107(a)(3)); United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 743-44 (8th Cir. 1986) (individual liability under § 107(a)(3). As the EPA simply acts as

prosecutor in such cases, the courts accord its judgment no more deference than they would a United States Attorney's decision to seek an indictment. Similarly, in deciding whether persons who refuse to comply with an abatement order have a good faith defense against EPA enforcement of fines and penalties, courts have resolved the issue independently. See Wagner Seed Co. v. Daggett, 800 F.2d 310, 316 (2d Cir.1986) (interpreting CERCLA § 107(c)(3)); Wagner Electric Corp. v. Thomas, 612 F.Supp. 736, 744-45 (D.Kan.1985)(interpreting CERCLA § 106(b)). Decisions on each of these issues necessarily involve trade-offs between competing policy values, so the courts' independent resolution of them reflects a sense that that character-istic, even coupled with an agency's

role as prosecutor, is not enough to make Chevron applicable. Compare Maj. Op. at 923.

The above decisions address the various substantive issues without deference to EPA, but, like Bethlehem Steel Corp. v. Bush, 918 F.2d 1323 (7th Cir.1990), which defers on the "receives and complies" issue, they do so without analysis of the deference issue itself. One circuit court opinion, however, expressly considers the problem, refusing to defer to EPA's position on the scope of the injunctive relief authorized by the first sentence of CERCLA § 106(a). United States v. Ottati & Goss, Inc., 900 F.2d 429, 434-36 (1st Cir.1990). Rather than loosely aggregating CERCLA's many provisions and dubbing EPA its "administrator", Judge Breyer used a

methodology similar to that of Adams Fruit, which had issued just two weeks earlier. He carefully distinguished between EPA orders under the second sentence of § 106(a),[1] for which the statute provides judicial review, and EPA injunction suits under the first sentence of § 106(a), as to which

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[1] Section 106(a) provides in pertinent part: when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance for a facility, he may [through the Attorney General] secure such relief as may be necessary to abate such danger or threat, and the district court . . . shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment. 42 U.S.C. § 9606(a).

Congress used no terms suggestive of judicial review. Id. at 434-35. Even though EPA necessarily made an initial decision on what injunctive relief to seek, the court was to craft the injunction de novo. Here, as in Ottati & Goss, we do not review an EPA order but simply entertain a suit between EPA and a private firm.[2]

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[2] The court in Ottati & Goss had no occasion to consider the interpretation of statutory terms relevant both to the validity of an order under the first sentence and an injunction suit under the second. Similarly, as the present issue can arise only in private suits for reimbursement, we need not consider what deference might be applicable on a legal issue that could arise either in a § 106(b)(2) suit or in judicial review of some administrative action. Section 106(b)(2)(D) specifies the arbitrary and capricious standard on one such dual-track issue (challenges to the agency's "decision in selecting the response action ordered"), but there may be others.

Here, of course, the government is the defendant not the prosecutor, but that should make no difference. The Federal Tort Claims Act, like § 106(b)(2), requires a potential plaintiff first to submit its claim to the government and to sue within a specified time after the government has disposed of the claim. See 28 U.S.C. § 2401(b) (requiring claim first to be "presented in writing to the appropriate Federal agency within two years after such claim accrues"); see also id. at § 2675; Schuler v. United States, 628 F.2d 199, 201-02 (D.C.Cir.1980) (en banc) (discussing procedure and clarifying ambiguities in statutory text). Not surprisingly, no court has ever invoked Chevron or deferred to an agency's views when interpreting 28 U.S.C. § 2401, although there has been

no shortage of interpretive issues. See Gould v. Department of Health & Human Services, 884 F.2d 785, 787-88 (4th Cir.1989) (rejecting government's position on when action accrues); Rosales v. United States, 824 F.2d 799, 804-05 (9th Cir. 1987) (same); Nicolazzo v. United States, 786 F.2d 454 (1st Cir.1986) (same); Cogburn v. United States, 717 F.Supp. 958, 960-63 (D.Mass. 1989) (holds limitation period subject to equitable tolling). As the statutory text provides no clear answers to these questions, and choosing an answer requires a balancing of competing policy interest, the solutions would be within the agency's domain if Chevron applied.

CERCLA and the FTCA are also similar in that neither statute singles out any particular agency for its administration. Section 106(b)(2) calls

for submission of petitions to the President; he has delegated that role to the EPA, Exec. Order No. 12,580, § 4(d)(1), 52 Fed.Reg. 2923, 2926 (1987), but has delegated other CERCLA functions to a wide range of agencies, including the Public Health Service, the Federal Emergency Management Agency, the Departments of Defense, Energy and Transportation, and the Coast Guard.[3]

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[3] See, e.g., Exec.Order § 2(a) (delegating President's authority under CERCLA § 104(b)(1) and 104(i) to Public Health Service); id. § 2(c) (delegating President's authority under CERCLA §§ 104(a), 126(b), 117 and 119 to Federal Emergency Management Agency); id. § 2(d) (delegating President's authority under CERCLA §§ 104(a), (b), (c)(4), 113(k), 117(a), (c), 119 and 121 to Departments of Defense and Energy); id. § 5(a) (delegating President's authority under CERCLA § 107(c)(1)(C) to Department of Transportation); id. § 7(b)(2) (delegating President's authority under CERCLA § 109 to Coast Guard).

The FTCA requires every claim to be presented to the "appropriate" federal agency, see 28 U.S.C. §§ 2401(b), 2675(a), and the Department of Justice has interpreted that as the "agency whose activities gave rise to the claim," 28 CFR § 14.2(b)(1). See Administrative Claims Under the Federal Tort Claims Act, 45 Fed.Reg. 2650 (1980).While the current dispensation thus gives many agencies a hand in administering the FTCA, the authority apparently could be concentrated in, say, the Department of Justice, as indeed much now is. See 28 CFR §§ 14.6, 14.7. Such a consolidation could hardly form a basis for inferring congressional intent to delegate Chevron-type interpretive power to the Department. Compare Massachusetts v. Morash, 490 U.S. 107, 116-17 & n. 11, 109 S.Ct.

1668, 1673-74 n. 11, 104 L.Ed.2d 98 (1989) (resting deference to Secretary of Labor on specific congressional delegation of rulemaking authority to "define accounting, technical, and trade terms"). In any event, the President has not consolidated his CERCLA functions but rather has dispersed them among many agencies.

Here there is no basis for finding a delegation of relevant portions of the statute to the EPA. One might try to do so at a highly aggregate level, as the EPA received the lion's share of the President's CERCLA duties. But that route is barred by Adams Fruit; while recognizing that the Department of Agriculture was in primary charge of the Migrant and Seasonal Agricultural Worker Protection Act, the Supreme Court focused instead--and understandably--on

its lack of any role as to the private right of action. If we look at the particular remedy, as Adams Fruit instructs us, we find the courts in charge; the EPA functions simply as the defendant's agent for purposes of advance settlement of suits. As in the case of criminal indictments and FTCA claims resolution, such prelitigation involvement is not enough.

* * *

On the merits, I agree with the majority that the presumption against retroactivity, and Representative Eckart's statements on the floor, do not support the EPA. Maj. Op. at 924-925. I also agree that, to the extent that Congress enacted § 106(b) in order to provide incentives for potentially

responsible parties to undertake a response action, neither the EPA's nor Wagner's reading provides a prefect fit, Wagner's being overinclusive, EPA's underinclusive. Maj. Op. at 922.

The text of § 106(b)(2)(A), however, strongly favors Wagner's reading. It grants the right to petition the President (and thus the right to sue under § 106(b)(2)(B)) to "[a]ny person who receives and complies with" a § 106(a) order as long as the petition is filed "within 60 days after the completion of the required action." 42 U.S.C. § 9606(b)(2)(A). EPA would read this as if Congress were speaking on the day the statute was enacted, October 17, 1986, and were referring to "[a]ny person who [after this date] receives and complies with" a § 106(a) order.

I see no persuasive basis for finding such an extra condition in the statute. The section makes perfect sense if read without reference to the date of enactment. While the class of persons who "receive[ ] and compl[y] with" an order includes all who have ever done so, the requirement that they petition "within 60 days after completion of the required action" serves as a statute of limitations (and a short one at that); it also assures that there will be no application of the statute to remedial actions completed

much before enactment.[4] The section contains no reference to the date of enactment, directly or even by a "henceforth" or "in the future", while other provisions of the same act make

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[4] CERCLA as a whole manifests no reluctance to impose retroactive burdens on private parties. Courts have read its liability provisions to apply retroactively to pre-enactment disposal activities, see e.g., United States v. Monsanto Co., 858 F.2d at 174 & n. 31; United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d at 732-34; United States v. Hooker Chemicals & Plastics Corp., 680 F.Supp. 546, 556-57 (W.D.N.Y. 1988); United States v. Shell Oil Co., 605 F.Supp. 1064, 1072-79 (D.Colo. 1985), as they have the SARA amendments to those provisions, see, e.g., United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1505-06 (6th Cir.1989); cf. United States v. Rohm & Haas Co., 669 F.Supp. 672, 676-77 (D.N.J.1987) (SARA § 113(j) judicial review provisions apply retroactively).

the date of enactment determinative by explicitly incorporating it into the text. See, e.g., 42 U.S.C. § 9605(b), (g)(1)(A), (g)(3), added by Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. No. 99-499, § 105(b), (g), 100 Stat. 1613, 1625, 1627.

To overcome this language, EPA advances (besides the arguments that I join the majority in rejecting) the canon that statutes waiving the sovereign immunity of the United States should be construed strictly. Library of Congress v. Shaw, 478 U.S. 310, 318, 106 S.Ct. 2957, 2963, 92 L.Ed.2d 250 (1986); Block v. North Dakota ex rel. Board of University and School Lands, 461 U.S. 273, 287-88, 103 S.Ct. 1811, 1819-20, 75 L.Ed.2d 840 (1983). While the canon does not sweep all before it,

See Bowen v. City of New York, 476 U.S. 467, 479, 106 S.Ct. 2022, 2029, 90 L.Ed.2d 462 (1986) (a court must be careful not "'to narrow the waiver that congress intended'") (quoting United States v. Kubrick, 444 U.S. 111, 118, 100 S.Ct. 352, 357, 62 L.Ed.2d 259 (1979) (FTCA case)), it is in any event inapplicable.

Section 106(b)(2) merely added a second procedural avenue for reimbursement from Superfund. Congress had already waived sovereign immunity in 1980 by making the fund substantively liable. Section 111(a)(2) allows Superfund to be used for:

> payment of any claim for necessary response costs incurred by any other person [other than a governmental entity] as a result of carrying out the national contingency plan . . . . Provided, however, That such costs must

> first be approved under said plan and certified by the responsible Federal official;

42 U.S.C. § 9611(a)(2) (originally enacted as CERCLA § 111(a)(2), 94 Stat. 2789). Then as now, it provided that parties would be eligible for reimbursement if they were not "liable" as defined in § 107, 42 U.S.C. § 9607.[5]

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[5] Section 106(b)(2)(D) allows even liable parties to recover their response costs to the extent caused by arbitrary or capricious selection of response action by the President. But this does not appear to extend substantive liability, as under § 107(a)(4)(B) a responsible party is liable only for cleanup costs "consistent with the national contingency plan" (or costs "not inconsistent" with the plan for government response action, see § 107(a)(4)(A)), and a capriciously ordered response action would not be consistent with that plan. See § 105(a)(7), (remedial measures under the NCP should be "cost-effective"). The government does not claim that this aspect changes substantive liability.

Until the 1986 enactment of SARA, the sole procedure for making claims against Superfund was found in § 112. See CERCLA § 112, 94 Stat. 2792-95, codified as amended by SARA, §§ 109(a)(3), 112, 100 Stat. 1633, 1646-47, 42 U.S.C. § 9612 (detailing claims procedure). Section 106(b)(2) simply added an alternative procedural route for a special class of potentially responsible parties, those who had been issued § 106(a) orders. See S.Rep. No. 11, 99th Cong., 1st Sess. 58 (1985) (§ 106(b)(2) "establishes new procedures for reimbursement of certain responses costs and provides opportunities for judicial review of administrative orders once the response action . . . is completed") (emphasis added); H.R. Rep. No. 253, 99th Cong., 1st Sess. 83 (1985) U.S. Code Cong. & Admin. News 1986,

pp. 2835, 2865 (same). For this group, the new procedure dispenses with § 112(a)'s requirement that claims be first presented to the owner/operator of the facility and with § 112(b)'s requirement of an administrative hearing process; and instead of § 112's model of arbitration followed by judicial review under the arbitrary and capricious standard, § 112(b)(5), it provides for a civil action in which the petitioner must show the court its nonliability by a "preponderance of the evidence". 42 U.S.C. § 9606(b)(2)(C).

EPA argues that § 106(b)(2) extends the substantive liability of Superfund because it allows recovery of response costs even if they were not "approved under [the national contingency plan] and certified by the responsible Federal official," as required by § 111(a)(2).

See Brief for Appellee at 13 n. 7, and at 24. EPA has read § 111(a)(2)'s requirement of federal approval as requiring advance authorization. See 40 CFR § 300.25(d).

But this is no real distinction. Only recipients of a § 106(a) order are eligible under § 106(b)(2). To say that § 106(b)(2) broadens Superfund's substantive liability, then, is to say that a government order to do something is not an authorization to do it. EPA offers no explanation of how an order would not encompass authorization, and I can perceive none.[6]

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[6] This view is in no way inconsistent with this court's ruling in Ohio v. EPA, 838 F.2d 1325 (D.C.Cir.1988), where the court upheld EPA's decision to limit the class of cases for which would grant authorization. We did not address whether an order compelling a party to take response action constitutes authorization.

* * *

As EPA does not administer § 106(b), I would not apply Chevron deference to its view that § 106(b)(2)(A) contains a timing requirement in addition to the one that section adopts explicitly. Construing the provision independently, I would not adopt any such view myself. Accordingly I would reverse the judgment below.

Wagner Seed Co., Inc., Plaintiff,

v.

George Bush, President of the United States; United States Environmental Protection Agency, et al., Defendants.

Civ. A. No. 88-1922.

United States District Court, District of Columbia.

April 4, 1989.

Frank L. Amoroso, Rhonda S. Kahan, Rivkin, Radler, Dunne & Bayh, Uniondale, N.Y., Keith A. O'Donnell, Rivkin, Radler, Dunne & Bayh, Washington, D.C., for plaintiff.

Letitia J. Grishaw, U.S. Dept. of Justice, Land & Natural Resources Div., Environmental Defense Section, Joseph Freedman, Office of Gen. Counsel, U.S. E.P.A., Washington, D.C., Thomas Lieber,

U.S. E.P.A., New York City, for defendants.

OPINION AND ORDER

REVERCOMB, District Judge.

This case involves a claim by plaintiff, Wagner Seed Co., for reimbursement of funds expended by it for an environmental cleanup ordered by defendant United States Environmental Protection Agency ("EPA"). The case turns primarily on an interpretation of section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9606(b)(2). The parties each filed dispositive motions; oral argument was heard on December 1, 1988. In this opinion and order, the Court grants defendants' motion to dismiss.

I. Facts

Wagner Seed stored various agricultural products, including pesticides, at its warehouse in Farmingdale, New York. On June 1, 1985, lightning struck the warehouse, burning it down and releasing various contaminants into the environment. The EPA on December 31, 1985, ordered Wagner Seed to clean up the release.[1] While Wagner was in the

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1 Wagner Seed filed suit to enjoin the EPA from ordering cleanups, arguing that such orders, made pursuant to 42 U.S.C. § 9606(a), were unconstitutional. The United States District Court for the Eastern District of New York denied the motion for a preliminary injunction, and was affirmed by the United States Court of Appeals for the Second Circuit. Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir.1986). Wagner Seed then began to clean up the release of the contaminants.

process of cleaning up, Congress approved in 1986 the Superfund Amendments and Reauthorization Act (SARA), which amended CERCLA to provide for reimbursement from Superfund to companies who clean up environmental damage pursuant to an EPA order, if the companies are not liable for costs of the cleanup. 42 U.S.C. § 9606(b)(2). There is no liability if the accident was caused by an "act of God." 42 U.S.C. § 9607(b).

After Wagner Seed completed the cleanup to EPA's satisfaction, the company in 1988 petitioned under the new provision for reimbursement of the $2.3 million it expended for the cleanup.

The EPA denied the petition, maintaining that because Wagner Seed was already in the process of cleaning up pursuant to an EPA order when the law was enacted, the company was not entitled to reimbursement. This suit followed.

II. Discussion

The reimbursement provision -- section 106(b)(2) of CERCLA -- states that "[a]ny person who receives and complies with the terms of any order . . . may . . . petition . . . for reimbursement from the Fund. . . ." 42 U.S.C. § 9606(b)(2). The law clearly covers persons who receive orders from the EPA after the date of enactment, and Wagner Seed does not contend that the law was meant to apply retroactively to those who finished their

cleanups before the law was enacted. What is less than clear, however, is whether the provision applies to persons who were in the midst of a cleanup when the law was enacted.

Both sides have made valiant efforts to persuade the Court that it was the clear intent of Congress to have the law read in the manner in which they argue it should be read. Wagner Seed argues that if Congress had meant the EPA's interpretation, it would have written the law to apply to "anyone who will receive and will comply with an order." Plaintiff's Motion at 12. In response, defendants argue that Wagner Seed's interpretation would rewrite the law to give reimbursement to "anyone who receives or received an order." Defendants' Opposition at 3. The Court

finds neither syntactical analysis to be persuasive.

Similarly, neither side presents concrete evidence of congres- sional intent through legislative history.[2]

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[2] Defendants cite a statement by Rep. Dennis Eckart, a sponsor of the bill that included 106(b)(2), on the floor of the House of Representatives. In describing § 106(b)(2), Rep. Eckart said that the new provision would provide incentives to companies to under- take cleanups, and that "effective after the date of enactment of these amendments, a party who receives an order can begin the work of environmental cleanup while preserving its right to raise objections in a subsequent proceeding." 132 Cong. Rec. H9624 (daily ed. Oct. 8, 1986).

The Court is hesitant to give much weight to the statement of a single representative on the floor of the House, especially when the state- ment does not directly address the question before the Court. Rep. Eckart's statement does seem to make clear that the law was not meant to be retroactive to cleanups already completed; it is not, how- ever, conclusive enough evidence to convince the Court that Congress intended the reimbursement statute not apply to cleanups in progress when the law enacted.

Instead, the parties are reduced to drawing on secondary sources of statutory interpretation -- maxims, other laws, etc. -- to try to prove their points. Using these aids, the Court concludes that defendants have presented a stronger case, although no single argument on its own is fully persuasive.

The most persuasive of defendants' statutory construction arguments is based on the rules that a waiver of sovereign immunity is to be construed narrowly, see, e.g., United States v. King, 395 U.S. 1, 4-6, 89 S.Ct. 1501,

1502-1503, 23 L.Ed.2d 52 (1969), and that ambiguities concerning such waivers are to be strictly construed in favor of the government. See, e.g., Library of Congress v. Shaw, 478 U.S. 310, 318, 106 S.Ct. 2957, 2963, 92 L.Ed.2d 250 (1986). Because Superfund is a trust fund established in the United States Treasury, see 26 U.S.C. § 9507(a), statutes that permit actions to take money from Superfund must be subject to the usual rule about construing sovereign immunity ambiguities in favor of the United States. See Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963) (all suits to take money from the public treasury implicate sovereign immunity).

Somewhat less persuasive is defendant's argument, based on the maxim

of expressio unius est exclusio alterius, that "when Congress wanted to make a provision of [CERCLA] retroactive, it knew how to do so." Defendant's Motion at 19. Defendants argue that there is no ambiguity regarding congressional intent toward cleanups in progress when § 106(b)(2) was enacted because Congress has often specified when claims may be made under CERCLA for funds expended in the past. See, e.g., 42 U.S.C. § 9604(c)(5)(C) (credit may be extended to states that expended funds "after January 1, 1978, and before December 11, 1980"). Although the Court believes that this argument weighs in defendants' favor, it cannot conclude from this argument alone that Congress intended § 106(b)(2)

not to apply to cleanup operations in progress when the provision was enacted.

Defendants also point out that the stated purpose of reimbursement provision was to provide an additional incentive for companies to undertake cleanups and comply with cleanup orders. See H.R.Rep. No. 253, 99th Cong., 1st Sess. Pt. I, 139-40 (1986), U.S.Code Cong. & Admin.News 1985, p. 2835 (statement of EPA administrator); 132 Cong. Rec. H9624 (daily ed. Oct. 8, 1986) (statement of Rep. Eckart). Defendants argue that because there would no need to give an incentive to those who already had started cleanup at the time the section was enacted, the section would not be held to apply to Wagner Seed. The Court notes, however, that the purpose of the law would have been

advanced by encouraging those already cleaning up to complete the job thoroughly and without cutting corners. In sum, the Court finds this "purpose of the statute" argument to be less than dispositive.

Next, while the Court agrees with defendants that statutes affecting substantive rights should not be presumed to apply retroactively, see, e.g., Bennett v. New Jersey, 470 U.S. 632, 638-41, 105 S.Ct. 1555, 1559-61, 83 L.Ed.2d 572 (1985), the Court is not convinced that Wagner Seed's proposed interpretation would result in a "retroactive" application of the statute. Although applying § 106(b)(2) to Wagner Seed would reimburse the company in part for funds expended before the law went into effect, Wagner

Seed clearly was not entitled to petition for reimbursement under § 106(b)(2)(A) until it completed its cleanup, which was after the reimbursement section was enacted. See, e.g., Reynolds v. United States, 292 U.S. 443, 448-49, 54 S.Ct. 800, 803, 78 L.Ed. 1353 (1934) (statute allowing veterans not to have certain medical bills charged against them held not to be retroactive in this case merely because some of the expenses were incurred before the statute went into effect). In addition, the primary reason for avoiding retroactive application of statutes -- interference with antecedent expectations, see Bennett, 470 U.S. at 640, 105 S.Ct. at 1560 -- is not particularly strong in this case.

In sum, the Court does not find the "retroactivity" argument persuasive.

On the other hand, while defendants' statutory construction arguments may not be conclusive, the Court believes that they are stronger than Wagner Seed's. Beyond relying on the words of the statute, Wagner Seed points out correctly that a "remedial" statute is to be construed in favor of those whom it was intended to protect. See, e.g., Bell v. Brown, 557 F.2d 849, 853 (D.C.Cir.1977). However, while it is clear that § 106(b)(2) was intended to provide for reimbursement to some persons who expended funds for cleanups, it also undeniably does not provide reimbursement to any persons who finished cleanups before the provision

was enacted. Whether the provision applies to those in the middle, such as Wagner Seed, is not answered by the argument that Wagner Seed is the sort of person that the provision was meant to help.

Finally, the Court notes that when it is confronted with a question concerning construction of an ambiguous statute and an interpretation of that statute by the agency to whom administration is entrusted, the question for the reviewing court is whether the agency's interpretation is based on a permissible construction. Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). If the agency's interpretation is one of more than one possible

"reasonable" interpretations, the court must defer to the agency. See id. Indeed, even if the Court's interpretation would be different from the agency's, the Court must nonetheless uphold the agency's interpretation, as long as it is a reasonable one. Id. at 844, 104 S.Ct. at 2782. Deference to an agency's interpretation is required both because the agency holds the expertise on subjects within its domain and because policy choices should be made by the political branches, not the courts. Chevron, 467 U.S. at 864-66, 104 S.Ct. at 2792-93; Michigan Citizens for an Independent Press v. Thornburgh, 868 F.2d 1285, 1293 (D.C.Cir.1989).

Examining the EPA's interpretation of § 106(b)(2), the Court concludes that the interpretation must be upheld because it is a reasonable interpretation of an ambiguous statute. It was reasonable for the EPA to decide not to apply § 106(b)(2) to Wagner Seed, which had received the cleanup order from the EPA and had completed a substantial amount[3] of the cleanup before the statute was enacted. The EPA noted correctly that a chief purpose of the

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3 Defendants maintain that Wagner Seed had expended 98 percent of its cleanup expenses before § 106(b)(2) went into effect. The Court, however, does not take this factor into account in examining the reasonableness of the EPA's decision, which also apparently did not depend on the extent to which Wagner Seed had completed its cleanup.

provision, as expressed in the congressional reports, was to provide incentives for companies to undertake cleanups and comply with EPA orders. See H.R.Rep. No. 253, 99th Cong., 1st Sess. Pt. I, 139-40 (1985) (statement of EPA administrator); 132 Cong.Rec. H9624 (daily ed. Oct. 8, 1986) (statement of Rep. Eckart). While this incentive could have had some effect on those already in the process of cleaning up, it was reasonable for the EPA to decide to interpret the statute as not to apply to those companies that had already agreed to engage in cleanup.

When presented with the ambiguous reimbursement provision, the EPA was forced to decide where to make the cut-off -- either apply it to all companies who made petitions after the law went

into effect, or just to those companies who received EPA orders after the provision was enacted. The latter choice did not eviscerate the statute -- it simply placed those who were in the process of cleaning up in the same boat as those who completed cleanup before § 106(b)(2) was enacted. The EPA's decision to make the cut-off where it did -- not allowing reimbursement to companies who were already cleaning up when § 106(b)(2) was enacted -- was a reasonable interpretation of the statute.

In sum, the Court finds that defendant's motion to dismiss should be granted, both because the EPA 's statutory interpretation of an ambiguous statute was reasonable and, alternatively, because the tenets of statutory

interpretation weigh in favor of defendant's proposed statutory construction.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is DENIED; it is further

ORDERED that defendants' motion to dismiss is GRANTED.